APPENDIX A — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED SEPTEMBER 24, 2009

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

ELANA B. LUBIT,

Plaintiff-Respondent,

v.

ROY H. LUBIT,

Defendant-Appellant.

Sept. 24, 2009.

FRIEDMAN, J.P., SWEENY, CATTERSON, RENWICK, FREEDMAN, JJ.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered September 19, 2007, after a non-jury trial, which, to the extent appealed from, as limited by the briefs, granted plaintiff custody of the parties' children and denied defendant's request for joint custody, unanimously affirmed, without costs.

Appendix A

The court's determination awarding custody to the mother with liberal visitation privileges to the father was based on a thoughtful assessment of the testimony of the parties and the court-appointed forensic expert, and has a sound and substantial basis in the record (*see Eschbach v. Eschbach*, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 [1982]; *cf. Mohen v. Mohen*, 53 AD3d 471, 862 N.Y.S.2d 75 [2008], *lv. denied* 11 N.Y.3d 710, 900 N.E.2d 555, 872 N.Y.S.2d 72 [2008]; *Matter of Rebecca B.*, 204 AD2d 57, 611 N.Y.S.2d 831 [1994], *lv. denied* 84 N.Y.2d 808, 645 N.E.2d 1217, 621 N.Y.S.2d 517 [1994]). The evidence demonstrates that the acrimony and mistrust that marks the parties' relationship makes joint custody a nonviable option (*see Braiman v. Braiman*, 44 N.Y.2d 584, 589-590, 378 N.E.2d 1019, 407 N.Y.S.2d 449 [1978]; *Trapp v. Trapp*, 136 AD2d 178, 181-183, 526 N.Y.S.2d 95 [1988]). An attempt at joint custody that the parties negotiated failed when appellant unreasonably insisted that the parties share custody on such a strictly equal basis that for several months the three children, ages 2 to 8, alternated daily between their parents' residences. A detailed alternative worked out with a law guardian also failed. The parties were unable to co-parent because they were openly hostile to each other and, without drawn-out negotiations, could not reach agreement on any decisions with respect to their children, including important matters involving education, extra-curricular activities and medical care.

The court properly found that the interests of the young children will best be served by awarding sole

custody to the mother because her style of parenting is more nurturing and conducive to the children's emotional and intellectual development, and because she was the children's primary caretaker before this litigation commenced. Although the court found that the father is a loving, committed parent, it also found that his parenting skills had significant shortcomings. Among other things, the father demonstrated excessive anxiety about the children's physical well-being, and was inflexible in his response to the children's needs.

Contrary to the father's position, the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from the expert's psychiatric interviews of the parties and their children, alone and in combination (*see Balsz v. A & T Bus Co.*, 252 A.D.2d 458, 675 N.Y.S.2d 604 [1998]). To the extent that the expert's report and testimony may have incorporated inadmissible hearsay, we find that the admissible evidence in the record, including the portion of the expert's report that did not include hearsay, was sufficient to support the trial court's conclusion, and we would independently reach the same result based on the unobjectionable portions of the record. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error.

Finally, the court did not treat the law guardian as an unsworn witness by briefly referring to her opinion as to custody and her basis for it. Rather, the court appropriately took notice of the position that the law

guardian had taken as an advocate on the children's behalf (*see Bluntt v. O'Connor*, 291 A.D.2d 106, 117, 737 N.Y.S.2d 471 [2002], *lv. denied* 98 N.Y.2d 605, 773 N.E.2d 1017, 746 N.Y.S.2d 279 [2002]).

We have considered the father's additional arguments and find them without merit.

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE COUNTY OF NEW YORK, PART 51 DATED JUNE 15, 2007

SUPREME COURT OF THE COUNTY OF NEW YORK COUNTY OF NEW YORK: PART 51

Index. No. 350479/04

ELANA B. LUBIT,

Plaintiff,

-against-

ROY H. LUBIT,

Defendant.

DECISION & ORDER

EVANS, SARALEE, J.:

This is a decision after trial in the divorce action commenced by Elana Lubit against Roy Lubit. Plaintiff filed a Summons and Verified Complaint on September 7, 2004. Issue was joined on October 4, 2004. Plaintiff, who initially sought a divorce on the grounds of cruel and inhuman treatment pursuant to Domestic Relations Law ("DRL") §170(1), amended her complaint after executing a stipulation stating that she would seek a divorce on the grounds of constructive abandonment pursuant to DRL § 170(2) upon submission of an affidavit without inquest. Grounds having been agreed to prior

to trial, the court commenced a trial of the remaining disputed issues on January 3, 2007, continuing January 4, 5, 8, 22 and February 5, 2007. At trial the parties were represented by counsel and their three children appeared by a law guardian.

The matters presented to the court for decision include custody of the children, parental access, child support, as well as equitable distribution of the marital residence and one brokerage account. Plaintiff also seeks economic sanctions against defendant due to his refusal to provide her with a Jewish divorce, known as a Get. All of the remaining financial issues have been resolved by the terms of a prenuptial agreement.

The Trial

I have had a full opportunity to consider the evidence presented at trial, including the testimony offered and the exhibits received. The witnesses at trial included each of the parties and William H. Kaplan, M.D., the court appointed forensic psychiatrist. A therapist who treated Dr. Roy Lubit, and four of Dr. Lubit's friends and colleagues of his also testified about his qualities as a parent. On rebuttal, a former client of Roy Lubit testified for plaintiff, Dr. Elana Lubit. I have had the opportunity to observe the demeanor of the various witnesses called to testify and have made determinations on issues of credibility with respect to these witnesses.

Appendix B

After reviewing the testimony and exhibits in evidence, I now make the following findings of fact and conclusions of law.

Facts

The parties were married on September 6, 1996 in a religious ceremony. They are medical doctors who each place a high premium on education and religious practice. Plaintiff is an anesthesiologist and defendant is a child and adolescent psychiatrist with a specialty in forensic psychiatry. In addition, each has an advanced degree in another field. They have three young daughters—Rina, Talya and Lia—who attend a Jewish primary school on Manhattan's West Side[1].

Both parties have arranged their work schedules to maximize the amount of time they spend with the children. Dr. Elana Lubit is on the faculty of New York University Medical Center where she works long days on Wednesday, Thursday, Friday and on alternate weekends when the children are with their father. Although she works more than forty hours each week, she is considered to be on a part time schedule because she does not work every week day. Dr. Roy Lubit does not work on the days that he is scheduled to be with the children. He has a practice dedicated to private patients and forensic assignments that allows him flexibility with

1. Rina Ariela was born November 6, 1998; Talya Adira was born May 31, 2000; and Lia Daniels was born June 13, 2002.

his schedule. Additionally, although he is not presently a paid member of a hospital faculty, he supervises residents in psychiatry one day a week at New York University Medical Center.

At the outset of litigation, the parties lived together with the children in the marital residence, a cooperative apartment located at 165 West End Avenue. Thereafter, due to the high level of tension that existed in the home, the parties entered into an agreement allowing plaintiff to move out of the marital residence without prejudice to her claims at trial. She now lives in a rental apartment at 275 West 96th Street. Defendant continues to reside in the marital residence and hopes to remain there following the conclusion of this litigation. Pursuant to an agreement which was negotiated with the assistance of the law guardian, the children spend fifty percent of their time with each parent.

Until 2003, the year prior to commencement of this action, plaintiff was the parent primarily responsible for the children. At that time, defendant assured a greater role in their daily routine, and according to plaintiff's testimony, defendant began to compete with her for the children's attention. She noted, by way of example, that defendant wanted to be with the children when plaintiff walked them to camp and when she sat down with them to do homework. On those occasions, defendant told the girls that they did not have to walk with plaintiff or do homework with her, but that they could do those activities with him. Plaintiff believed that such competitive behavior was not good for the children.

Disagreeing with plaintiff's testimony in this regard, defendant maintains that he is now the parent who is primarily responsible for taking the children to school and to their medical appointments and arranging their play dates. He notes that because of plaintiffs work schedule she often delegates those duties to baby sitters, a practice he believes is detrimental to their well being. Defendant has offered to assume the responsibility of accompanying the children at such times as plaintiff is unavailable during plaintiff's scheduled parenting time. Plaintiff has declined his offer, stating that the children need definite boundaries that govern their schedule with each parent.

Because the parties have substantially different parenting styles, every decision related to the children is disputed. Every dispute, however minor, results in endless emails and complicated negotiations. Moreover, throughout this litigation every difference of opinion regarding the children has required the intercession of a third party for it to be resolved. The parents rely on the law guardian for assistance with schedules, safety issues, emergencies, camp, after school activities and medical treatment. Plaintiff testified to her belief that the parties had agreed to continue to send their children to Beit Rabban where they presently attend school, and to maintain their historic religious practice. Defendant testified that he did not necessarily agree with her understanding on those issues but did not state his present preferences regarding school or religious practice. Although the parties disagree about custody, they both suggest that a parent coordinator be

appointed by the court to help them to make decisions about the children.

Some of the greatest conflicts between the parents have involved Rina, the parties' eight year old daughter. The parties disagree about Rina's health and her after school and camp attendance. Shortly after this action commenced Rina exhibited signs of experiencing an inability to walk and visual hallucinations when her father. Roy Lubit became alarmed by Rina's symptoms and conveyed his concern to plaintiff, stating that he wanted to bring Rina to a neurologist for emergent care. Plaintiff disagreed with his plan. While Elana Lubit was also troubled by Rina's behavior, she believed that the girl was pretending to see things in order to get attention from her father. Plaintiff attributed her skepticism about the claimed impairment to the calm manner in which Rina relayed her symptoms, and then immediately explained that they were called hallucinations. According to plaintiff, Rina only experienced the symptoms in her father's presence. In the end, the symptoms abated soon after Rita began to see a psychologist. She continues to be treated by the psychologist for stress related to her parents' divorce.

Plaintiff also testified that defendant attempts to trade off one child's interest for another's in order to get his way. One specific instance she related involved defendant's desire to place Rina in an after school chess club during plaintiff's parenting time. When plaintiff objected that Rina was over programed and needed some "down, time," defendant refused to allow Lia to

be enrolled in an extended pre-school program unless plaintiff relented and agreed to permit Rina to attend chess club. Defendant failed to consider that the older children had attended the extended pre-school program or that Lia's attendance in it was supported by her teachers as well as plaintiff.

Another area of contention between the parties concerns plaintiff's treatment of Rina's respiratory ailments. Plaintiff, an anesthesiologist who regularly treats patients who manifest breathing difficulties, testified that Rina has mildly reactive airways, a condition that exacerbates the symptoms of a respiratory infection. She maintains a cautious, but low key approach to treating Rina. Defendant, who is more anxious about Rina's illnesses nas, on occasion, undermined plaintiff's treatment plan by advising Rina to take medicine that plaintiff concluded was not indicated, and has called Rina's pediatrician seeking her intervention more than once. On August 23, 2005, defendant brought Rina to her pediatrician with a complaint of wheezing that proved to be unremarkable. During the visit he disparaged plaintiff's treatment of Rina in front of the child, causing the doctor to ask Rina to leave the room, to discuss her condition with defendant out of the child's presence, and to note in Rina's medical chart that defendant's behavior was inappropriate. (Exhibits "G" and "H").

Asserting that defendant is excessively fearful about the children's physical well being, plaintiff testified at length concerning the effect that his fears have had on

the family. His anxiety resulted in the establishment of a series of rules in the marital home that precluded, *inter alia*, use of forks by everyone (to prevent gouging an eye), eating peanut butter (to avoid food poisoning), drinking coffee (to avert burns) and leaving the door to the apartment ajar (to prevent a child from wandering off and falling down hallway stairs). The rules required the application of sun screen to ensure against cancer each time the children left their home regardless of season or the length of time they were expected to be outdoors. Defendant's fear that one of the children would fall from the parents' platform bed caused him to advocate that their mattress be placed on the carpeted floor to prevent an anticipated injury, notwithstanding that plaintiff had installed safety rails on the bed. Plaintiff testified that defendant's anxieties also caused the children, especially Lia, to develop a fear of separation which was manifested on the days that defendant brought Lia to pre-school.

While not disputing the existence of these rules, defendant explained that as the children got older they relaxed. He testified that the children are now permitted to use forks and to eat peanut butter during his parenting time. He further stated that prior to the parties' separation, after consulting with an expert, he concluded that it was unnecessary to place the marital bed on the floor to avoid a potentially serious injury to a child who rolled off the bed. He maintained that most people would agree that exposure to the sun has negative effects and that his concern is not excessive.

Appendix B

Throughout the course of litigation defendant has pointed to violation of some rules by plaintiff as an indication that she was a less fit parent. He expressed his position to plaintiff directly and he noted several instances of plaintiff's purported carelessness to the law guardian and to medical professionals. On one occasion, shortly after plaintiff moved into her own apartment the law guardian notified her that defendant complained that the apartment terrace was a danger to the children. A date was set for the law guardian to inspect the apartment/terrace to ensure that it was safe. On the evening before the inspection was to occur, defendant returned the children to plaintiff's new apartment after a visit, entered the apartment without invitation, walked to the terrace door and pulled on it until the safety lock on the door broke. Plaintiff arranged for a locksmith to replace the lock the following morning, the same day as the law guardian's scheduled inspection. Defendant's actions appear to have been intended to show plaintiff in a bad light.

Elana Lubit is seeking sole custody of the children. She considers a 50/50 split of parental time a poor arrangement for the children who find it confusing to shuttle back and forth between homes during the school week. She believes that they need one home base. Pursuant to a detailed proposal she set forth the children would reside primarily with her, defendant would have liberal access to the children and, with the assistance of a neutral parental coordinator, he would participate in making decisions that affect the children. In the end, if there was no agreement on a disputed issue, Elana

Lubit would make the decision. She believes that unless one parent were able to make final decisions, it would be impossible to enroll the children in schools, camp and after school activities.

Roy Lubit is seeking shared custody of the children and a continuation of the same 50/50 time sharing schedule that is temporarily in place. He maintains that he is the more available parent during the week and that he is more able to take the children to their after school activities, arrange play dates and doctors' appointments. He also notes that plaintiff leaves for work on some mornings before the children awaken and on those mornings they are cared for by a baby sitter. Defendant views this as detrimental to the children and maintains that it would be in the children's best interests for him to care for them every morning that plaintiff is unavailable, regardless of where the children sleep.

Claiming that the children are more attached to him, defendant relies on a letter written by a psychotherapist who treated him in the 1990s. The letter states that plaintiff told the therapist in 2001 (when Talya was one year old, and one year prior to Lia's birth) that the children insist on being with their father when they are upset. (Ex. P). He also notes as support for his conclusion about the children's attachment to him that during an interview with the court appointed neutral forensic in this case, Mina drew a card on which she wrote "I love Dad the best" but that she did not express similar sentiments about her mother. Defendant revealed that plaintiff talked with the children in Hebrew in his

presence, ignoring the fact that he did not understand the language and making him feel excluded. He did not explain that prior to having children the parties agreed that when they had a family it would be beneficial for children to be fluent in another language. They agreed that the mother would speak with the children in Hebrew, and perhaps the father would speak with them in French.

The father testified that if he were the custodial parent, he would look to the children for guidance when making decisions about such critical issues as which school to send them to and whether they should continue to follow the orthodox Jewish tradition. He distinguished his parenting style from plaintiff's in this regard implying that she would not place the same importance on the wishes of the children—all of whom are eight years old or younger—when making decisions about significant issues.

The law guardian, speaking for the children, opines that Elana Lubit should be awarded sole custody and that Roy Lubit should be given liberal parenting time with them. Her conclusion is based on extensive interaction with the family for a period of more than two years, the parties' trial testimony and the forensic psychiatrist's testimony. Noting defendant's tendency to try to place plaintiff in a bad light, his indecision, his over protective behavior *vis a vis* the children and his inability to separate his needs from the children's needs, the law guardian also stated that plaintiff demonstrated a "sensible and pragmatic approach that realistically

assessed what was appropriate for the children given their respective maturity and stages of development."

Expert Testimony

Forensic Examiner

The court appointed neutral psychiatrist William Kaplan, M.D. evaluated the Lubit family and testified about his observations. Dr. Kaplan, a child and adolescent psychiatrist was qualified as an expert. A report of his findings is in evidence as the Court's Exhibit I. Prior to testifying, Dr. Kaplan interviewed the parties, their children and the children's babysitter. He talked with their doctors and therapists. Because it was during the summer, he was unsuccessful in reaching the children's teachers. He reviewed reports of psychological testing previously done by Daniel Gensler, a clinical psychologist, documents submitted to him by the parties, plaintiff's diary and letters from defendant. In addition, he observed each of the parents separately interacting with the children in his office.

Dr. Kaplan is the second neutral appointed to evaluate the Lubit family[2]. The court's order of

2. After the fast forensic examiner issued his report, defendant moved to preclude his testimony due to a claimed conflict of interest. The doctor had not revealed to defendant or the court that he had recently co-authored an academic paper with plaintiff's attorney. After argument, I concluded that there was no conflict of interest, but to avoid the appearance of a conflict I appointed a second forensic who did not know either of the parties or their attorneys.

appointment instructed Dr. Kaplan not to read the prior appointee's report and not to contact him. He complied with the order.

Dr. Kaplan assessed the parties' relative parenting capacities and testified to his findings. According to the doctor's testimony he used Dr. Gensler's test results to clarify his impression of the parties' personality styles and problems, and he reviewed documents proffered by the parties and found them to be relevant. He concluded that Roy Lubit is "an extremely thoughtful, articulate, soft-spoken individual" who is "sincere about his commitment to his children." In this regard, the doctor noted that Roy Lubit rearranged his professional schedule so that he is available to meet the children's needs. Dr. Kaplan further observed that defendant ". . . has a great deal of anxiety and he has an obsessional style" (Ex. I, p. 47) which causes him to be "overly anxious" and making it difficult to move on or reach "a compromise with Elana in terns of decision-making for the children." The doctor concluded that defendant's obsessional style causes him to focus on the manner in which plaintiff interacts with the children, and he is critical of her style and the decisions she makes affecting the children.

In addition, the doctor related that Roy Lubit's "excessive concerns about the physical safety of the children" stand in the way of his working cooperatively or amicably with Elana Lubit concerning the children (Ex. I, p. 48). The doctor stated that defendant's anxiety, which is communicated to the children, causes problems

in dealing with plaintiff because the parties do not "share the same obsessional style" in dealing with the children. According to Dr. Kaplan, defendant's "obsessive parenting style" has had an adverse effect on the children, causing the older two girls to affect a "pseudo-mature style" (Ex. I, p. 49). It causes them to discuss topics that are very mature or very cognitively advanced so that they can bring pleasure to their father who takes pride in such accomplishment.

In contrast, Dr. Kaplan concluded that Elana Lubit has a more open and warmer parenting style. He observed that plaintiff is more "hands-on" with the children, that she is less intrusive and less anxious. Plaintiff told the doctor that the defendant's anxiety is conveyed to the children and has an adverse effect on them; accordingly, she does not support defendant's approach. The doctor concurred with plaintiff's concern that Rina has become overly focused on physical problems, that she exhibits somatic or physical complaints that appear to be attention seeking rather than having a physical basis. In part, Dr. Kaplan attributed Rina's complaints to her relationship with defendant and her exposure to his fears. In this regard, the doctor recited defendant's excessive concerns with exposing the children to sunlight for fear of its linkage to cancer and his fear of dangers within the apartment and outdoors during play. He explained that the difference between the parents' approach has caused situational confusion. Notwithstanding the above, based on the manner in which they played in his office and how they interacted with their parents, Dr. Kaplan

agrees with the conclusion reached by the parents and the professionals with whom he spoke, finding the children to be generally well-adjusted and high functioning.

The doctor relied, in part on the information provided to him by Jean Edwards, the children's baby sitter. Ms. Edwards, who has worked with the children for many years, had direct observation of interactions between the parties, and of their interactions with the children. The information she imparted to Dr. Kaplan assisted him in reaching his conclusions insofar as it corroborated his conclusion that the mother is the calmer and more natural parent. Ms. Edwards reported that plaintiff is more effective at discipline than the father who lacked consistency in this regard. She told Dr. Kaplan that the mother is more patient with the children and more inclined to play with them than the father.

Cross-examination of Dr. Kaplan by defendant focused on the doctor's perceived departure from guidelines established by professional organizations in his field; his failing to re-score the psychological tests administered and scored by Dr. Gensler; not being aware of the number of times a court did, or did not, follow recommendations he made in trial testimony; his decision to put certain words, phrases and sentences in bold face in his report, thereby creating an unfair impression of the parties; and, implying that the witness did not understand the interaction between plaintiff and the children because they spoke in Hebrew during his

evaluation of them, a language he does not speak. Notwithstanding defendant's prolonged attack on Dr. Kaplan's methodology, I found the doctor to be a credible witness—one whose trial testimony provided assistance to the court.

Failing to follow the specific instruction of the court that he not make recommendations on specific custodial plans, Dr. Kaplan included them in his report. Accordingly, after hearing defendant's objection to the court's receiving testimony on this point, I limited the doctor's testimony to his observations as to why the present 50/50 split of parenting time is, or is not, working for the children[3]. The doctor's response to this limited area of inquiry was that the current custodial arrangement causes the children stress. He attributed the stress, in part, to the parents' competition to be the super parent. According to Dr. Kaplan's testimony, such behavior deprives the children of normal spontaneity in their play, causes them to become self-conscious and to feel that they are obliged to gratify or please their parents. In the end, it has an adverse effect on their psychological development.

The testimony given by the other collateral witnesses was of little value to the court. Four friends

3. The report is in evidence as the Court's Exhibit I. The ultimate conclusions stated in it in violation of the court's appointment are excluded from consideration in reaching the conclusions contained in this decision.

and colleagues of defendant's testified that he is a caring and attentive father. Lori Bollinger, a therapist who treated defendant from 1994-1998, was called to testify for the purpose of relating the contents of a telephone call she had with plaintiff in 2001 when the Lubit's oldest child was not yet three years old. In lieu of hearing Dr. Bollinger's testimony about the telephone conversation, an email Ms. Bollinger wrote to Dr. Kaplan concerning the 2001 telephone call was received in evidence. In rebuttal, plaintiff offered testimony of a man for whom defendant had provided forensic assistance in a matrimonial action. Defendant is presently in litigation with the witness; consequently, his testimony is given little weight.

Analysis

Custody

Paramount to every custody decision is a determination of the best interests of the child under the totality of the circumstances. *Friederwitzer v. Friederwitzer*, 55 NY2d 89 (1982). A court's consideration of the child's best interests must contemplate what would best promote the child's welfare and happiness. *Eschbach v. Eschbach*, 56 NY2d 167 (1982). In making such a determination there are no absolutes. The court looks for guidance to a number of factors including, the quality of the home environment, the guidance that each of the parents provides for the child, the ability of a parent to provide necessary emotional and intellectual development, the financial status of the parent and the child's wishes. *Id.* at 172.

Appendix B

A joint custodial arrangement is preferred for parents who are relatively stable and amicable and who agree to making joint decisions. *Braiman v. Braiman*, 44 NY2d 584 (1978); *Ring v. Ring*, 15 AD3d 406 (2nd Dept. 2005). If however, the parents are incapable of exercising the degree of cooperation required for a joint parenting relationship to be successful, joint custody is to be avoided. *Bliss v. Ash*, 86 AD2d 575 (1st Dept 1982), *aff'd* 56 NY2d 995 (1982).

An analysis of each of the factors relative to deciding this issue follows:

Quality of the Home Environment and Parental Guidance — The parents lived together in disharmony until September, 2006 when plaintiff moved from the marital residence to a two bedroom rental apartment. Pursuant to a stipulation governing visitation *pendente lite*, the children spend fifty per cent of their time with each parent in their respective homes. Although very little evidence was adduced on this issue, it appears that both homes are physically comfortable.

Both parents are loving and attentive parents who are concerned about the children. They both provide a warm environment that places value on the children's education, religious observance and health. There is credible evidence before the court for me to conclude that the parties have significantly different parenting styles. Plaintiff-mother is more playful with the children, and while she places emphasis on education, she is less likely than defendant to use every event as an

opportunity to promote and enforce academic achievement. She is concerned about the children's physical health and safety, but does not dwell on the myriad pitfalls that a child can encounter in her home or at play. She appears to incorporate the children's needs into her routine easily.

In contrast, defendant-father exhibits anxiety about what he perceives to be the many opportunities for illness and accident in his children's lives. The record reveals that he has enforced unusual safety precautions in the marital home including, *inter alia*, banning forks for children and adult use; forbidding consumption of some foods; conveying to the children a heightened fear of the danger of exposure to the sun by inventing the concept of the "sun wolf' and requiring them to apply sun screen for even brief excursions outdoors; and advocating that the parents' bed be placed on the rug of the bedroom floor to prevent a child from falling from the bed. Defendant's anxiety appears to be a factor in the oldest child's over emphasis on somatic symptoms to get attention, and the youngest child's separation difficulty when defendant brings her to school.

The parents' current employment arrangement requires plaintiff to spend longer hours away from home than defendant, necessitating the greater use of baby sitters. There is, however, no indication that the children are negatively affected by the amount of time they are attended to by baby sitters. Schedules notwithstanding, plaintiff is the warmer and more nurturing parent. She

is more relaxed in attending to the children's needs. And she is more able to separate her needs from the needs of the children.

Ability to Provide Emotional and Intellectual Development — Both parents are educated, place a high value on the importance of education and are competent to provide for the children's intellectual development. Until this litigation commenced they appeared to agree to send their children to a Jewish day school through middle school. Defendant's testimony revealed for the first time that he may have changed his position. He indicated that he would allow the three children to decide whether they wished to continue in Beit Rabban, the school they currently attend. Given their ages and stages of development, this approach does not seem appropriate. Defendant further stated that he would give similar deference to the children's wishes about which branch of Judaism to follow in the future. This undue deference to the desire of children who are eight years old or younger reflects a lack of understanding of the role of a parent *vis a vis* young children. Dr. Kaplan testified. that defendant "gets stuck on issues affecting the children." In contrast, plaintiff is unequivocal about decision making and plans to continue the educational and religious path that the parties established prior to the divorce litigation.

Both parents have relied on the assistance of third persons to assist them to make decisions throughout their marriage. Implicit in their testimony is the belief that they will utilize a third person—a therapist or a

parent coordinator—to mediate when they are unable to concur on an important decision concerning the children. During this litigation there have been many instances that have required the law guardian to decide an issue that the parties could not resolve regarding the children's medical, school and camp. In the future they will not have the luxury of yielding their decision making authority to a neutral decision maker to resolve the day-to-day matters that will need to be resolved. Under these circumstances, one of the parents should have the ultimate authority to make decisions.

Financial Status — This is not an issue. The parties are both capable of earning an adequate living to support their children. Although the plaintiff appears to have earned slightly more money than defendant in 2005-2006, the disparity is due, in part, to defendant's voluntary decision to arrange his schedule to be at home when he is the custodial parent. Prior to commencement of litigation, defendant had a more traditional work week which afforded him the potential for greater income. The parties, who live modestly, have been able to provide for all of their children's needs and the testimony reveals that they will be able to continue to do so in the future.

Desire of the Children — The children love both parents and are comfortable with them. The testimony of Dr. Kaplan and the other collateral witnesses was consistent and reveals that the children are well adjusted and appear to have weathered this difficult period well, with the assistance of therapy. They appear to want to spend time with both parents.

Appendix B

Impact of Domestic Violence — The court is mandated by statute to consider the impact of domestic violence on the children in making a custody/access determination. DRL §240(1). "[A]buse or violence perpetrated by one of the parents against the other or a child is a legitimate factor for the court to consider in making its custody determination."

Each of the parties alleged that the other committed acts of domestic violence and sought an order of protection. After conducting a hearing, I concluded that the parties were engaging in acts of incivility, but that neither committed acts of domestic violence. Accordingly, both applications were denied. The effect of domestic violence therefore plays no role in this court's custody determination.

The credible evidence establishes that the parents love their children and are committed to raising their daughters in a way to maximize their options to grow into intelligent and caring young women. It further shows that while the parties demonstrate a strong commitment to their children, the defendant has proven to be self-referential in setting goals for the children. In this regard, defendant strongly encourages achievement in the areas he values, but does not explore their needs and preferences as he professes to do. Additionally, defendant has exposed the children to his excessive anxieties about their physical well-being to the detriment of the older girls. The father, who is invested in proving that plaintiff is a negligent and inferior parent, has conveyed his criticism of plaintiff to the

children and to the professionals with whom the parties interact.

The evidence adduced at trial demonstrates that the mother is more suited to be the custodial parent. The forensic examiner, Dr. Kaplan's testimony supports plaintiff's position that until shortly before this litigation was commenced she was the children's primary caretaker, an arrangement that was pleasing to both parties until the marriage deteriorated. In addition, the evidence reveals that her parenting skills are more natural and that she easily encourages the children's development.

In considering the best interest of the children in light of the aforementioned factors, it is clear to the court that the acrimony between the parties makes joint custody an unrealistic option. In the *Braiman* case noted above, the Court of Appeals held that joint custody arrangements are imposed only "as a voluntary alternative for relatively stable, amicable parents behaving in a mature fashion." *Braiman v. Braiman*, 44 NY2d 584 (1978). The parents in this case do not communicate. Their hostility to one another is palpable. The consequence of their failure to communicate results in additional tension for the children. It unnecessarily delays decisions affecting the children's education and extra-curricular activities, and it results in contradictory decisions about medical concerns. Moreover, when an issue such as a conflict about school or camp has arisen, neither party has been willing to accommodate, or even listen to, the other's objection. Accordingly, although the

parties may someday be able to co-parent, that is not presently true. The court finds that joint custody is inappropriate.

Accordingly, the plaintiff's application for sole custody of the children is granted. She shall be the residential custodial parent subject to the access schedule discussed below. In addition, plaintiff shall be awarded legal custody of the children and shall have the authority to make all of the major decisions with regard to their education, extra-curricular and camp activities, religious observation and medical needs. Each parent may make day-to-day decisions that might arise during their parental time with the children, but in so doing neither shall be permitted to intentionally undermine the other.

Plaintiff shall not make any major decisions concerning the children without first consulting defendant sufficiently in advance of making the decision to enable him the opportunity to offer timely suggestions and opinions. The plaintiff shall consider the defendant's suggestions and shall respond to them in writing prior to making a final decision. If the parents are incapable of discussing the issues, they are encouraged to use email, but an exchange of information is required before a decision is made. Additionally, both parents have indicated that they would encourage the mediation services of a third person to assist in the decision making process. Although, I cannot order the parties to engage a mediator or parent coordinator, I note that resorting to one has been valuable in the past and that it may be a positive avenue for the parties to pursue.

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Access

Pursuant to a stipulation, following the parties' physical separation they have temporarily shared physical custody of the children on a 50/50 schedule. Dr. Kaplan and the law guardian both concluded that this arrangement has added stress for the children, and that continuation of it is not in their best interests. According to Dr. Kaplan, the stress is related, in part, to the fact that each of the parties has competed to be the more capable parent during this period, thereby creating an unnatural environment. In addition, the fact that the parents have different parenting styles and disagree about every aspect of child rearing has added to the stress and now warrants a change in this schedule. Under the prevailing circumstances, the plaintiff is quite right when she states that the children need one home base.

In the present case both parents have submitted proposed parenting schedules which I have taken into consideration in determining what I believe to be the best resolution for the children. Because the parties' references to religious observation includes dates on the Hebrew calendar as well as the secular calendar, a clarification is noted at the beginning of the discussion of schedules. That is, all dates and years specified in this order refer to the secular calendar.

The children shall reside with their mother on weekdays, and shall spend alternate weekends with each parent. The weekend schedule shall begin with pick up

from school on Friday and shall end when they shall be delivered to school on Monday morning. The children will spend every. Thursday night with their father, beginning with pick up from school on Thursday. The father shall take them to school on Friday. In the event that the father is unable to avail himself of the scheduled week day/weekend parenting time due to a professional conflict, he shall notify the mother sufficiently in advance to allow her to make appropriate arrangements for the children. The father shall be permitted make up time for a portion of the lost time at a time that is convenient to both parents. In addition, the parents may adjust the at weekend schedule by mutual agreement to accommodate each other's schedule.

When transfers from one parent to the other occur on a school day, the parent who is scheduled to pick up the children on that day assumes responsibility for them at 9:00 a.m. If a sick child needs to stay home from school, the parent due to pick up the children from school must take care of the sick child starting at 9:00 a.m., unless there is a compelling medical reason not to move the child or the parents agree to alternate arrangements. Each parent may delegate pick up and child care of the children to appropriate caregivers.

The secular holidays, which shall include Thanksgiving, New Years Eve, Martin Luther King Day, July 4th and Labor Day shall be alternated as follows: In odd-numbered years Roy Lubit shall have Thanksgiving with the children starting from after school on the Wednesday immediately before

Thanksgiving day and ending 5:00 p.m. on Sunday evening following the holiday. In even numbered years, Elana Lubit shall spend this time with the children. In even numbered years, Roy Lubit shall spend New Year's Eve with the children and Elana shall have the holiday with them in the odd numbered years. The children shall spend Martin Luther King Day and July 4th with Roy Lubit in odd numbered years and with Elana Lubit in even numbered years. The children will spend Labor Day with Elana Lubit in odd numbered years and with Roy Lubit on even numbered years. Any adjustments that are required to the weekly calendar to accommodate holiday schedules must be made at least eleven weeks before the holiday in order to permit plaintiff to plan her work schedule.

Jewish holidays shall include, *inter alia,* Rosh Hashanah (two nights). Yom Kippur (two nights), Succoth (two nights) Simchat Torah (one night), Chanukah (eight nights), Purim (one night), Passover (two nights) Shavuot (two nights). The parties shall share the holidays as close to evenly as possible. On the odd numbered years, Roy Lubit shall spend Yom Kippur, Simchat Torah, the first four nights of Chanukah, Purim and Passover with the children, and Elana Lubit shall spend Rosh Hashanah, Succoth, the last four nights of Chanukah, and Shavuot with them. The reverse shall be true on even numbered years. No special arrangements shall be made for any other Jewish holidays. To the extent that the parents may have made other plans for the secular year 2007, that agreement shall remain in effect and the instant schedule shall

commence in the calendar year 2008. Additionally, if the parties agree to a holiday schedule that is more suited to their *mutual desire,* they may adjust the schedule in a writing without resort to the court. The Jewish holiday schedule shall take precedence over the weekly access schedule.

The school the children attend has three extended breaks during the academic year. They shall be divided as close to evenly as possible. In odd numbered years, Elana Lubit shall spend the first six nights of the winter (December) break with the children. Roy Lubit shall spend the remainder of the holiday with, them. This schedule shall be reversed in the even numbered years. In even numbered years, Roy Lubit shall spend the first six nights of the February break with the children. Elana Lubit shall spend the remainder of the holiday with them. This schedule shall be reversed in odd numbered years. In even numbered years, Elana Lubit will have the first week of the Passover break, which includes both Seder nights of the holiday with the children. Roy Lubit shall have the second week of the holiday with them. The schedule shall be reversed on odd numbered years.

The children have attended day camp during the summer for eight weeks, and are expected to continue to do so in the future. The remainder of the summer vacation shall be shared evenly between the parents. Each of the parents shall have a two-week vacation period with the children. In the odd numbered years, the father shall have a two-week vacation period with the children prior to the commencement of camp and

the mother shall have a two-week vacation during the two weeks after camp. The reverse vacation schedule will be in effect on even numbered years. If the summer break does not have precisely four weeks in addition to the eight weeks of camp, the parties shall share the non-camp period evenly.

Responsibility for planning and hosting the children's class birthday parties will alternate. As is true of all other division of holiday parenting time, the schedule will alternate each year to provide each of the parents with as close to equal time with each of the children at her school birthday celebration. In odd numbered years, Roy Lubit shall host Talia and Rina's class birthday parties and Elana Lubit shall host Lia's party. In even numbered years, that arrangement shall be reversed. When one parent hosts the party, the other parent will bring the cake and light the birthday candles. Each parent will have the opportunity to celebrate his/her own birthday with the children on its actual date. If that should occur on the other parent's access time, a make-up date shall be arranged sufficiently in advance to accommodate the other's schedule. The same is true for other's day and father's day if the parents wish to celebrate his or her day with the children.

Although the mother wishes to create a schedule and set the parameters for the girls' Bat Mitzvahs now, it is too far in advance to put any arrangement into an order. The oldest child is eight years old. There are too many intervening years between now and the first celebration for a court order to be able to anticipate

events that may impact on a Bat Mitzvah for a reasonable order to be established. Perhaps over time, the parties will be able to make such personal arrangements without court intervention,

The parents will both respect the other's parenting time. Neither will intrude when the children are with the other parent. The non-custodial parent may have one daily telephone call, of reasonable length, with the children during the other's parenting time. Upon written agreement, the parties may adjust any aspect of the schedule to something more suitable to their needs.

Child Support

Payment of child support is governed by the Child Support Standards Act ("CSSA") which requires that a percentage of the basic cost of raising a child be paid by the non-custodial parent to the custodial parent. DRL §240 1-b(a). Child support is based upon each parent's ability to pay, not necessarily the parent's income. *K. v. B.*, 13 AD3d 12 (1st Dept. 2004); *Matter of Zwick v. Kulhan,* 226 AD2d 734 (2nd Dept. 1996). Under appropriate circumstances the court may impute to a party his earning potential rather than his current income. DRL §240 1-b(b)(5)(iv); *Fruchter v. Fruchter,* 29 AD3d 942 (2nd Dept 2006).

In a family such as this with three children, child support consists of twenty-nine percent of the combined parental income up to eighty-thousand dollars. Such an

amount shall be prorated in the same proportion as each parent's income is to the combined parental income. DRL § 240 1-b (c). If the combined parental income exceeds $80,000, the court shall determine the amount of child support for the amount of combined parental income in excess of such dollar amount through consideration of such factors as: the financial resources of each parent, the physical and emotional health of the children and his/her special needs, the standard of living the child would have enjoyed had the marriage not been dissolved; the tax consequences to the parties; the non-monetary contributions that each parent will make toward the care and well-being of the child and other factors the court may think are relevant to the case.

Plaintiff is the custodial parent for the purposes of child support. The parents are medical doctors with a combined annual income that exceeds $300,000. Plaintiff is a salaried employee who earned a gross income of $211,286 in 2006, and defendant is a self-employed psychiatrist who earned $127,000 that year. These figures fail to take into account the fact that defendant chose to adhere to a reduced work schedule during the pendency of this litigation for the ostensible reason that he wanted to spend more time with his children than he previously had.

Plaintiff claims that as a board-certified psychiatrist practicing a full time schedule in New York City, as he did prior to commencement of this action, defendant's income would be substantially higher. In this regard, she has offered the rebuttal testimony of John. Chase,

a former client and one-time friend of defendant. Mr. Chase testified that defendant revealed that he intended to artificially reduce his income to minimize the child support obligations that would be imposed at the conclusion of this litigation. Because Mr. Chase's testimony may be colored by separate litigation in which defendant seeks money damages from him, I give it little weight.

It does appear that an income of $150,000 should reasonably be attributed to defendant who conceded that he voluntarily reduced his workload when the marriage deteriorated. Defendant's now claims that his income was involuntarily reduced when plaintiff sought an Order of Protection against him, claiming that the Supreme Court in New York Comity ceased appointing him to be a forensic examiner in custody cases. He failed to substantial to this allegation with probative evidence of the number of appointments he received prior and subsequent to plaintiffs application seeking an order of protection. Accordingly, I conclude that defendant's reported income of $127,000 is less than it would be due to his voluntary red action of his work week, and I impute an income of $150,000 to him for the purpose of determining his child support obligations. Thus, by assuming that defendant's income could reasonably be $150,000 annually, and considering the actual, income information provided to the court, I conclude that the parent's combined income is approximately $360,000, of which plaintiff's portion is 60% and defendant's is 40%.

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Twenty-nine percent of the combined parental income up to $80,000 is $23,200. Pursuant to the CSSA, defendant's proportionate share is $9,280 per year or $773.33 each month. In this case, taking the parties' total income into consideration, the equitable distribution of the parties' assets, the children's needs and the parties' life style, it is appropriate for the court to apply the CSSA guideline percentage of 29% to $100,000 in combined parental income in excess of the mandatory $80,000 totaling $180,000. Defendant's proportionate share (40%) of the additional child support obligation of $100,000 combined parental income would amount to $11,600 annually or, $966,67 monthly. Therefore, defendant's total basic child support obligation is $1,740 per month. Defendant's child support obligations shall be reduced in accordance with the CSSA guidelines as each child is emancipated or completes a four-year college program.

With respect to add-on expenses, the parties shall share them in the same proportion as they share basic child support, with, sixty percent paid by plaintiff and forty percent paid by defendant. Add-on expenses shall include un-reimbursed medical expenses, child care expenses, educational costs including private school and college, as well as camp and extra-curricular expenses. Payment shall be made to plaintiff within thirty days after presentation to defendant of copies of bills for these expenses.

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Equitable Distribution

The parties waived equitable distribution in a prenuptial agreement executed on September 1, 1996 (Plaintiff's Ex. 13). Article I of the agreement provides that if the marriage is dissolved by legal proceedings, jointly held assets shall be divided equally, regardless of who furnished the funds to purchase the jointly held property. The parties own a cooperative apartment situated at 165 West End Avenue, unit 3-K, New York, New York. It, and a Fidelity brokerage account, are the only jointly held assets relevant to this decision[4]. At the request of the parties, East Coast Appraisal Service inspected the apartment and stated its value to be $830,000 as of December 14, 2005 (See Court's Ex. II). The outstanding mortgage balance at the commencement of trial was $308,362, Equity in the apartment is $521,637, of which each of the parties is entitled to half.

Defendant-father wishes to continue to live in the marital apartment after the conclusion of this action. He seeks a judgment allowing him to pay plaintiff her share of its value when the youngest child reaches the age of 21 years. In the alternative, defendant asks to be permitted to purchase plaintiff's share of the apartment over an unspecified period of time, without interest, so that he can retain the marital home which is near the

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4. After commencement of this action, defendant purchased a studio apartment which is adjacent to the marital residence. There is no dispute that it is his separate property.

children's "school, activities, therapists and friends." Without offering testimony of his assets, defendant claims that unless he is given an extended period in which to pay plaintiff for her share of the apartment, he will not be able to remain in it.

A custodial parent may be awarded sole use and occupancy of a marital residence during the children's minority "without regard to the form of ownership such the property." *Goldblum v. Goldblum*, 301 AD2d 567 (2nd Dept. 2003). In such a case, the court weighs the financial need of the parties against the need of the custodial parent to occupy the marital residence. Using this analysis, the court declines to exercise its discretion to allow defendant to defer paying plaintiff her equitable distribution of half of the value of the apartment until the children reach their majority, or even over an extended time without paying interest. The court is not persuaded that defendant is unable to pay plaintiff and also remain in the apartment. The Schedule of Assets and Liabilities of Roy H. Lubit appended to the prenuptial agreement in evidence reveals that defendant has separate property that could be utilized to help pay plaintiff her equitable share of the value of the apartment. In addition, he is in a position to utilize the proceeds of the sale of the studio apartment that he recently purchased to pay plaintiff a portion of the money due to her, in order to remain in the marital residence. Finally, as defendant will not be the custodial parent of the children following entry of judgment, the equities do not lie in his favor.

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The value of the marital residence shall be divided equally between the parties. If defendant wishes to remain in the apartment, he shall have 120 days from the date of this decision in which to pay plaintiff her 50% share. If defendant chooses not to keep the apartment, it shall be sold and the proceeds of the sale shall be equally divided after paying taxes, closing costs and giving credit, if any is due to the party who has made mortgage payments during the pendency of the litigation.

The parties jointly hold a Fidelity Investments brokerage account which had an approximate value of $19,000 at commencement of trial. They shall share the current value of the account equally.

Imposition of Sanctions

Plaintiff seeks economic sanctions in the form of a money judgment against defendant due to his alleged refusal to remove all barriers to her remarriage. The parties were married by a Rabbi in a Jewish religious ceremony. Unless defendant provides her with a religious divorce known as a Get she will be precluded from remarrying in a Jewish religious ceremony. It is her position that defendant told her after commencement of this action that he will never provide her with a Get.

A Jewish religious divorce is more readily obtainable by a husband than a wife *Golding v. Golding*, 176 AD2d 20 (1st Dept. 1992); *Matter of Rubin v. Rubin*, 75 Misc.d

776 (Fam Ct Bronx County, 1973). In an attempt to redress the problem created when a Jewish husband refuses to provide his wife with a Get, the legislature enacted DRL §253 which permits a court to withhold a final judgment of divorce to a plaintiff husband who refuses to provide a Get to his wife. A separate section authorizes a court, where appropriate, to "consider the effect of a barrier to remarriage" when determining equitable distribution, and to fashion a remedy. DRL § 236 (B)(5)(h). The remedy plaintiff seeks is an equitable adjustment of the proceeds of the value of the marital residence. Under the prevailing circumstances this prayer for relief is premature.

Defendant testified that be will provide plaintiff with a Get at the conclusion of trial. There is presently no reason to believe that defendant will not honor his commitment. Consequently, the defendant shall be given a period of 30 days from the date of this decision and order in which to provide the plaintiff with a Get. Should defendant fail to take all steps necessary to remove the barriers to plaintiff's remarriage during the 30-day period, plaintiff may move the court for equitable relief in the form of economic sanctions. Accordingly, this branch of plaintiff's prayer for relief is premature and is denied without prejudice.

Any additional issues raised in post-trial memoranda have been considered and are denied.

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Conclusion

The court having examined all of the factors relative to a determination of child custody, access, equitable distribution, child support and sanctions, it is

ORDERED that plaintiff is awarded physical custody of the minor children of the marriage, and it is further

ORDERED that plaintiff is awarded legal custody of the children of the marriage, and it is further

ORDERED that the parties shall share parenting time in the manner stated above, and it is further

ORDERED that the parties shall share the value of the marital apartment and the Fidelity brokerage account equally, and it is further

ORDERED that if defendant remains in the marital apartment he will pay plaintiff her equitable share of its value within 120 days of the date of this order, and plaintiff shall simultaneously execute all documents necessary to transfer ownership to defendant's name, and it is further

ORDERED that defendant shall be required to pay plaintiff monthly basic child support in the amount of $1,740, and it is further

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ORDERED that defendant shall be required to pay plaintiff 40% of the add-on expenses for un-reimbursed medical expenses, child care costs, educational expenses including private school tuition and college, extra-curricular and camp expenses, and it is further.

ORDERED that plaintiff's application for sanctions is denied without prejudice to renewal should defendant fail to provide her with a GET within 30 days of this decision and order.

This constitutes the decision and order of the court. Plaintiff shall settle judgment on notice within sixty days.

Dated: New York, New York
June 15, 2007

s/ Saralee Evans
Saralee Evans, JSC
HON. SARALEE EVANS

APPENDIX C — MOTION OF THE COURT OF APPEALS OF NEW YORK DENYING LEAVE TO APPEAL FILED JANUARY 14, 2010

COURT OF APPEALS OF NEW YORK

No. 2009-1247.

ELANA B. LUBIT,

Respondent,

v.

ROY H. LUBIT,

Appellant.

Jan. 14, 2010.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.